UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
	)	
v.	***)***	***Docket No. CR-90-36-P***
	)	
ANDRES GONZALEZ,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

Andres Gonzalez moves this court to modify his sentence pursuant to 28 U.S.C. § 2255 by reducing it in accordance with Amendment 518 to the United States Sentencing Commission Guidelines ("U.S.S.G."), which took effect on November 1, 1995. Gonzalez was convicted after a jury trial of conspiracy to possess with intent to distribute in excess of 500 grams of cocaine, in violation of 21 U.S.C. §§ 841 and 846.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Dziurgot v. Luther*, 879 F.2d 1222, 1225 (1st Cir. 1990) (citation omitted). In this instance, I find that Gonzalez's allegations are insufficient to justify relief even if accepted as true, and accordingly I recommend that his motion be denied.

I. Background

Gonzalez was convicted on October 3, 1990, after a jury trial, of conspiracy to distribute and to possess with intent to distribute in excess of 500 grams of cocaine, in violation of 21 U.S.C. §§ 841 and 846. Judgment (Docket No. 12) at 1. He was sentenced to 260 months imprisonment. *Id*. at 2. Following a direct appeal, the sentence was reduced to 210 months. Amended Judgment (Docket No. 22) at 2.

On September 13, 1994 Gonzalez filed a motion under 28 U.S.C. § 2255, alleging that he had received ineffective assistance of counsel at the trial level and that the court had used an incorrect quantity of cocaine to establish the base offense level for purposes of applying the Sentencing Guidelines. Motion Under 28 U.S.C. § 2255 (Docket No. 26) at 4 and Supporting Memorandum at 3-14. This motion was denied without an evidentiary hearing, Docket No. 30, and the denial was upheld on appeal without reported opinion, *United States v. Gonzalez*, 69 F.3d 531 (1st Cir. 1995) (table). The current section 2255 motion was filed on November 18, 1996. Docket No. 35.

II. Analysis

Gonzalez seeks reduction of his sentence by application of Amendment 518 to the Sentencing Guidelines, which became effective November 1, 1995. Amendment 518, which changed Application Note 12 to the commentary accompanying U.S.S.G. § 2D1.1, provides in relevant part:

> In an offense involving an agreement to sell a controlled substance, the agree-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance — actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more

> accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing.

U.S.S.G. Manual (1995) ("Manual"), Appendix C, at 422. The final sentence of Amendment 518 provides: "The effective date of this amendment is November 1, 1995." *Id*. at 424.

Under 18 U.S.C. § 3582(c)(2), a term of imprisonment may not be modified once it has been imposed, except that

> in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(*o*), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

The policy statement of the Sentencing Commission is found at U.S.S.G. § 1B1.10(a):

> Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (c) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement and thus is not authorized.

Amendment 518 is not listed in subsection (c) of section 1B1.10. Therefore, Gonzalez does not appear to be entitled to relief. *United States v. Havener*, 905 F.2d 3, 7-8 (1st Cir. 1990).

While acknowledging this fact, Gonzalez nonetheless asserts his claim based on two

arguments: that the policy statement violates 18 U.S.C. § 3553(a)(6), and that Amendment 518 should be considered as clarification of an existing principle, rather than a substantive amendment, and therefore applicable to all sentences imposed before its effective date, citing *United States v. Felix*, 87 F.3d 1057 (9th Cir. 1996).

Section 3553(a)(6) provides that, in imposing a sentence, the court shall consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The statute applies by its terms to defendants who are being sentenced, not to defendants who were sentenced five years before a change in the sentencing guidelines. Even assuming that the language could be applied to such defendants, what matters under section 3553(a)(6) is that Gonzalez "will be treated the same as all those convicted of the same offense at the same time, regardless of when they are sentenced," not that he will be treated the same, by subsequent amendments to his sentence, as all those convicted of the same offense at a later time. *United States v. Springer*, 28 F.3d 236, 238 (1st Cir. 1994). Section 3553(a)(6) does not support Gonzalez's motion.

In *Felix*, the Ninth Circuit, without discussing the Policy Statement, held that Amendment 518 applied retroactively when it became effective while the appeal of the defendants seeking to invoke it was pending. 87 F.3d at 1060. The Ninth Circuit held that Amendment 518 represented a clarifying rather than a substantive change and could therefore be applied to sentences on appeal at the time of the change. *Id.* This result is not inconsistent with the Policy Statement, which provides that sentence reduction is not available to defendants already serving a term of imprisonment under amendments not listed. Gonzalez, unlike the defendants in *Felix*, had been serving his sentence for approximately four years before Amendment 518 became effective.

The First Circuit has held that amendments to the Sentencing Guidelines that are intended to clarify rather than change the operation of the Guidelines may be applied retroactively, even in the absence of a recommendation of retroactivity by the Sentencing Commission under section 3582(c)(2). *Isabel v. United States*, 980 F.2d 60, 62-63 & n.4 (1992). In that case, the Sentencing Commission itself stated that the amendment at issue "clarifies the operation of" the relevant guideline. *Id*. at 62. There is no such statement in Amendment 518, although the Commission does note that disputes over the former version of the commentary to section 2D1.1 "have produced much litigation." Manual at 424.

Assuming without deciding that Amendment 518 is applicable retroactively to Gonzalez's sentence, he is nevertheless not entitled to relief. His argument is based on the assertion that the transaction forming the basis for his sentence was a completed transaction, as it must in order to take advantage of the change created by Amendment 518. Motion for Modification of Sentence ("Motion") (Docket No. 35) at 6-7.[1] The language of Application Note 12 concerning an uncompleted transaction was not changed by Amendment 518. Manual at 421-22. However, the evidence of record shows that the transaction was not completed.

Gonzalez himself states in his motion that his conviction was based on his agreement in New York City to sell three kilograms of cocaine to an informant, one of which was tendered at the time of agreement in return for a partial payment of $4,000, with an additional $33,500 to be paid for that kilogram and $75,000 to be paid for the two additional kilograms upon delivery in Portland, Maine.

[1] To the extent that Gonzalez's motion may be interpreted to be based upon an assertion that he did not intend to deliver the amounts that he agreed to produce during negotiations with the undercover agents posing as buyers, that issue was raised and decided against him on his direct appeal, *United States v. Moreno*, 947 F.2d 7, 9 (1st Cir. 1991), and is unavailable to him on collateral review, *Argencourt v. United States*, 78 F.3d 14, 16 n.1 (1st Cir. 1996).

Motion at 1. The $33,500 was never given to Gonzalez. *Id*. at 2. These statements are supported by the evidence at trial, Trial Transcript at 102, 223, and establish that the transaction was not completed. Further, as the First Circuit noted, "Gonzalez agreed to supply ostensible drug dealers from Canada with five to ten kilograms of cocaine on a biweekly basis." *Moreno*, 947 F.2d at 8. The First Circuit has not yet defined a "completed" transaction within the meaning of Application Note 12 to section 2D1.1 of the Sentencing Guidelines, but significant guidance is provided by the Ninth Circuit in *Felix*, the case upon which Gonzalez relies. In that case, the Ninth Circuit found that the transaction at issue was completed because "the precise cocaine under negotiation was present and because all of the conspirators were ready to sell the cocaine but for the FBI's delaying tactics" and because "no further delivery was contemplated." *Felix*, 87 F.3d at 1059. Here, not all of the cocaine under negotiation was present and further delivery clearly was contemplated. The transaction was not completed, and Amendment 518 therefore does not apply.

III. Conclusion

For the foregoing reasons, I recommend that the motion for modification of sentence be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 11th day of February, 1997.

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David M. Cohen
United States Magistrate Judge